

United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

THE BRIDGFORD COMPANY, a
Corporation, Bankrupt.

PAUL W. SAMPSELL, Trustee in Bankruptcy
for the Estate of The Bridgford Company, a
Corporation, Bankrupt,

Appellant,

vs.

HUGH H. BRIDGFORD,

Appellee.

PETITION FOR REHEARING

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No. 14880

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PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT, AND TO THE
JUDGES THEREOF:

Appellee in the above-entitled cause presents
this his petition for rehearing of the above-entitled
cause and in support thereof respectfully shows:

I

THE APPELLEE, HUGH H. BRIDGFORD,
DID NOT BREACH HIS TRUST.

In what respect is the Appellee in receipt of any
"ill-gotten" gains, as claimed by Appellant?

One group of authorities holds that a trustee cannot buy a claim against his beneficiary at a discount and secure the full value thereof from the beneficiary. Wickersham v. Crittendon, 93 Cal. 17; Matter of the Van Sweringen Company, 119 F. 2d 231 (C. A. 6th).

Another group of authorities holds that a trustee is guilty of breach of trust when he deals with trust

property, that a loyal trustee must not permit the possibility of his assuming an interest adverse to that of his trust; that he must not seek a personal profit in dealing with the subject of his trust. Pepper v. Litton, 308 U. S. 295; Donovan & Schuenke, et al. v. Sampsell as Trustee, et al., 226 F. 2d 804; Los Angeles Lumber Products Co., 46 Fed. Supp. 77.

The language used in the Los Angeles Lumber Products Co. case, and in many other cases, appears to stand for the general proposition that a trustee must not only exercise the highest fidelity toward the beneficiaries, but must not permit himself to be in a position in which such faith may be jeopardized.

There is nothing in the entire record of this case which indicates that the Appellee was ever in a position in any way adverse to the best interests of the beneficiaries of his trust. He did not deal in the

subject matter of the trust. The debtor's certificates represented a liability of the debtor in possession, not an asset. The certificates were not a subject matter of the trust.

Appellee did not deal in or with the obligations of the debtor in possession. He did not use his position to gain an advantage over the beneficiaries of the trust.

The record indicates that valid and subsisting obligations of the debtor in possession were given to Appellee. The concept of a gift is practically the antithesis of the concept of dealing in a commercial transaction. When a gift is made, business as such is not being transacted. It is commonplace for the executor of a decedent's estate to also be a donee. The fact that the executor does not take the affirmative action of disclaiming the gift which he receives does not taint him with dishonesty. If Appellee had gone into the open

market and had used his business ability to buy the certificates at a discount, he would be in violation of his trust.

The general duty of a trustee is well defined in the Restatement, Trusts #201. "A breach of trust is a violation by the trustee of any duty which as a trustee he owes to the beneficiary." This duty certainly does not, however, require that the trustee surrender all of his property rights to the cestuis que trust. All they are entitled to is the subject matter of the trust and all of the rights, privileges, and benefits legitimately flowing therefrom. It must be kept in mind that they did receive the benefit of the money for which the certificates were issued.

II

WHAT IS THE DUTY OF A TRUSTEE?

It does not seem reasonable to hold that a trustee

is under a duty to disclaim a gift because such gift is an obligation of the beneficiary or of the trustor. A debt is not a trust. (Restatement, Trusts, #12).

The rule prohibiting a trustee from acquiring an interest adverse to a beneficiary does not apply where the interest is not a foreseen or foreseeable consequence of the employment. Burns v. Clark, 133 Cal. 634.

"If the trustee enters into a transaction not connected with the administration of the trust, he is not accountable for a profit which may result merely because the trust property is indirectly affected thereby." (Restatement, Trusts, #203 e).

Furthermore, the trustor, or beneficiary, can only assert ownership of the interest of the trustee where bad faith of the trustee is shown. Snedeker v.

Ayers, 146 Cal. 407.

Hugh Bridgford did not acquire these certificates because of knowledge gained through his office as manager of the debtor in possession. They were given to him. The transfer was voluntary. The duty of the Appellee to the debtor in possession and the creditors had nothing to do with the transfer. His position is no different than if he acquired them by inheritance. Would Appellant be entitled to a windfall of \$30,000.00 by reason of such a bequest?

It is well established that a trustee may also be a beneficiary of the trust. (54 Am. Jur. 102). Indeed it is commonplace for an individual executor to be a beneficiary. The authorities cite no instance in which a Court has held that an executor could not be the donee of a legatee.

Could R. H. Hadley have given the Appellee an

automobile or any sum of money which Appellee could have lawfully kept as against the claim of Appellant? The duty of a trustee does not proscribe his acceptance of a gift, unless the gift be designed to influence his judgment against the best interests of the beneficiary.

If Hadley had cashed in the certificates and given the proceeds, or even a portion thereof to Appellee, could Appellant have claimed them as against Appellee?

An answer in the affirmative would seem to require a trustee to grant all of his future pecuniary gains to the beneficiaries, irrespective of the source thereof, so long as the trust continues.

"A trustee is entitled to reimbursement for his proper outlays, and it has been said that the doctrine that trustees must be deprived of all profits made by them out of trust funds must not be pushed too far, lest it 'should inspire

"'dread of all trusts and drive honest men from their acceptance.' Although a trustee generally is not entitled to retain a bonus or gratuity received from a third person as a consequence of his administration of the trust, under some circumstances a trustee has been permitted to retain a bonus or gratuity received from a third person. A trustee has also been permitted to retain compensation received by him as a director or officer in a corporation, where stock that he held in the corporation belonged to the trust estate." (54 Am. Jur. 249, 250).

A trustee may take part in a transaction concerning the trust if done in good faith and without any purpose of fraud. Snedeker v. Ayers, 146 Cal. 407.

III

THE DONOR, R. H. HADLEY, HAD A RIGHT TO DISPOSE OF THE CERTIFICATES AS HE SAW FIT.

Counsel for Appellant in his argument before this Court flatly stated that the certificates would be entitled to the priority accorded them by the United States District Court, had they been presented for payment by R. H. Hadley.

The certificates were valuable property rights belonging to Hadley, the assignor. The certificates were valid and the owner thereof had a right to use them or dispose of them as he saw fit. In disposing of them as he did, he wished to confer a benefit upon the Appellee. There is no indication whatsoever that he desired or intended to benefit the debtor in possession or its creditors. A donor is entitled to select the object of his generosity. To hold that this gift now inures to the

benefit of the creditors of the bankrupt rather than to the Appellee would defeat the purpose of the donor and destroy the right under the law which he has to select the donee of the gift. Such a holding would circumscribe and place a limitation upon property rights which finds no authority under the law.

If Appellee had secured the certificates by fraud, presumably his assignor could secure a judgment setting aside the assignment, and present them for payment. This, however, has not been attempted. In fact Hadley reaffirmed the gift in his testimony before the Referee.

IV

THESE CERTIFICATES WERE ENTITLED TO
PRIORITY IN HADLEY'S HANDS AND THIS
PRIOR STATUS WAS NOT LOST BY THE GIFT.

Appellee is unable to reconcile the statements of this Honorable Court in its opinion with reference to the priority status or value of these Certificates in Mr.

Hadley's hands. In one place in the opinion, it is stated:

"The claim which on a Friday was worthless in the hands of the owner ****"

On the other hand, the opinion also states:

"There is no need to consider **** the status of the Certificates had they been retained by Hadley ***".

The priority status of these Certificates and their value in Mr. Hadley's hands has never been questioned by Appellant. Appellant, in his Briefs in the lower Courts, admitted that these Certificates in Hadley's hands were entitled to full payment. Counsel for Appellant in his argument before this Court re-affirmed this admission. This issue, being thus admitted, was not even briefed by Appellee in his Brief filed in this Court.

The opinion of this Honorable Court has the result of holding that these Certificates, purchased for full value by Hadley, a Fiduciary, and having a priority status entitled to full payment, completely lost this priority and value when given by Hadley to Mr. Bridgford, solely because Mr. Bridgford was also a Fiduciary. This, it is submitted, is not sound law, and Appellee respectfully suggests that this result is obtained because of the failure of this Court to appreciate that the priority status and value of these Certificates in Mr. Hadley's hands was admitted and was not a contested issue before this Court.

For the reasons stated above petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed, and the judgment

